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MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-1195

JOHN TOKHEIM, MARY C. TOKHEIM and
FARMERS STATE BANK,
Petitioners,

v.

RONALD BLUME,
Respondent

RESPONDENT'S BRIEF IN OPPOSITION
TO PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF IOWA

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STATEMENT OF THE CASE

A. Summary of the Facts

In conformity with Petitioner's Brief, Ronald Blume will be referred to as Respondent and the individual Petitioners as John Tokheim, Mary C. Tokheim and the Bank.

Respondent Ron Blume is a laboring man with an eleventh grade education who purchased two farms on contract in 1969 and 1970, totalling 222 acres. Farmers State Bank is a family owned business in Charter Oak, Iowa, which is managed for all

practical purposes by John Tokheim in the day-to-day business of the bank. John Tokheim is a college educated man with many years banking experience and some legal education beyond his college degree; Mary C. Tokheim is his wife and is also a shareholder and a member of the board of directors of the bank.

Early in 1972, Respondent borrowed \$6,865.00 from the Bank. However, the two notes evidencing that debt were almost immediately purchased individually by John Tokheim from the bank and at the same time John Tokheim requested and received from Respondent assignments of the Respondent's equity in his two farm contracts. About a year later, in January of 1973, Respondent went to John Tokheim and asked if he could borrow some more money from the bank. John Tokheim refused, telling Respondent that he owed the Bank \$17,000.00 and that the sheriff was looking for Respondent to "foreclose" on Respondent's farm. Tokheim told Respondent that the latter was over-extended on his credit and that the bank examiners would call Tokheim to task if he loaned him any more money. Tokheim then told Respondent that things would be easier if Respondent would simply sign deeds to the farm over to John and Mary Tokheim and then Tokheim would pay all the bills outstanding and give Respondent \$2,000.00 cash. In response to these representations, Respondent did execute the deeds to his two farms and signed the Bill of Sale giving John and Mary Tokheim all of his crops.

B. Statement of the Proceedings Below

Respondent filed Petition at Law in the District Court of Iowa in and for Crawford County in June of 1974, as an action at law for \$50,000.00 actual damages and \$50,000.00 punitive damages jointly and severally. Almost immediately thereafter, Respondent amended his Petition adding a fourth division, this time praying for the equitable relief of cancellation of the deeds, return of the farms and grain, fair rental value of the farms from the date they were taken from him, and for full equity among the parties. The case eventually was decided upon this Division IV which was the only equity division of the Petition and is not set forth in Petitioner's Appendix but is set forth in the Appendix hereto. During the course of the trial, Division IV of the Petition was amended to include a prayer for punitive damages.

A jury was sworn and during the course of the proceedings, Respondent elected to submit the case for final determination in the equity division only, dropping the first three divisions from his Petition except to the extent the allegations therein were incorporated by reference in the equity claim. An advisory jury was retained and judgment and decree was rendered in favor of the Respondent granting him cancellation of the deeds and damages for the crops, the rental value, and punitive damages. After post-trial motions, an appeal was taken to the Supreme Court of Iowa which transferred the case to the Court of Appeals of Iowa under Section 684.1 of the Code of Iowa. The Court of Appeals of Iowa in a per curiam opinion affirmed the trial court. Petitioners filed

Application for Further Review to the Supreme Court of Iowa which was denied in November of 1978.

ARGUMENT

Petitioners' contention that the Respondent's pleading in the case below gave him no notice nor opportunity to defend the claim that John Tokheim "did not disclose his substantial personal stake in Blume's 'bank' indebtedness during the negotiations," must fail on the face of the pleadings alone. It is alleged in the Respondent's original Petition, below, that a fiduciary relationship existed between Petitioners and Respondent and it is specifically alleged, in paragraph 4 of Division III (as incorporated by reference in the equity division) as follows:

4. Because of said fiduciary relationship, Defendants were obligated to reveal fully and accurately to the Plaintiff all of his indebtedness with the Farmers State Bank, Charter Oak, Iowa, . . .
 (Emphasis added).

The allegation of a fiduciary relationship and failure to reveal accurate information about Respondent's indebtedness was sufficient to give notice to Petitioners.

[T]he principal function of pleadings is to give the adverse party fair notice of the claim asserted in the form of a generalized

summary sufficient to allow that party to make an adequate response.

United States v. Metro Development Corp., 61 F.R.D. 83, 86 (1973)

Further, the issue of to whom the money was owed was raised repeatedly by Petitioners at trial and on appeal, and therefore, the issue was tried by consent and the Petitioners cannot now complain that they lacked notice. It is fundamental, hornbook law that a party who fails to take exception to evidence but instead consents to its admission or even offers it himself into evidence cannot complain.

It must be remembered that this cause was tried in the Iowa District Court and heard in the appellate courts of Iowa in equity, wherein review is *de novo*, both as to the facts and the law. Iowa R. App. P., rule 4; Blake v. Blake, 13 Iowa 40 (1862); State ex rel Turner v. Younker Bros., Inc., 210 N.W. 2d 550 (Iowa 1973). All appeals in equity are triable anew substantially as though the appellate court had original jurisdiction. Manning v. Ottumwa Auto Co., 210 Iowa 1182, 232 N.W. 501 (1930). The judgment on appeal may be based upon different grounds from that of the trial court and the judgment of the trial court will be affirmed even if the reviewing court disagrees with the grounds upon which the trial court based its decision. Myers v. Smith, 208 N.W. 2d 919, 921 (Iowa 1973); City of Des Moines v. Harvey, 243 N.W. 2d 606, 610 (Iowa 1976).

The action as tried below and as submitted to the Court of Appeals of Iowa was for cancellation of Quit Claim Deeds to farmland made by Respondent and for damages, based upon the alleged fraud of the Petitioners in inducing the transfer of the land by Respondent. This Court has stated:

The decision of the state court as to what should be deemed a fraudulent conveyance does not present any federal question, nor does the application by the court of the evidence in reaching that decision raise one. McKenna v. Simpson, 129 U.S. 506, 509, 9 S.Ct. 365, 367, 32 L.Ed. 771, 774 (1889).

Further, in a de novo review by the Court of Appeals of Iowa, principles of local and general law govern the determination, and such questions of law are not reviewable by writ to a state court in this Court.

Avery v. Popper, 179 U.S. 305, 313 (1900). It was stated in Krammer v. Wilson, 195 U.S. 410, 416 (1904), in dicta, "to reverse the state court upon this point would be to hold that it improperly construed its own laws with reference to fraudulent conveyances." This Court has consistently refused to grant jurisdiction in equity cases involving alleged fraudulent conveyances. See, e.g., Phillips v. Mitchell, 248 U.S. 531 (1918) and cases cited thereunder.

Petitioners' contention that the Court of Appeals of Iowa injected a different theory of fraud into the determination is untenable. The Decree of the trial court states in part:

The Court finds in accordance with the Special Interrogatories found by the jury that false statements were made by John Tokheim to Ronald Blume concerning his indebtedness or willingness of the defendants to pay all outstanding debts of the plaintiff as a statement of fact . . .
(Emphasis added)

Thus, the basis of the trial court's determination was not that John Tokheim made false statements about the total amount owing, but rather that he made false statements "concerning his indebtedness". The opinion of the Iowa Court of Appeals (set forth in Petitioners' Appendix) recites other affirmative false statements by John Tokheim, for example, that Tokheim was fearful the bank examiners would chastise him for the over extension of credit to Blume and that Blume's farms were about to be "foreclosed on".

Beyond the affirmative misstatements by John Tokheim to Respondent, there most definitely was a failure of Tokheim to reveal his stake in the Respondent's indebtedness. Petitioners' describe this fact as falling under the category of "failure to disclose," but in the present cause it does not matter whether one categorizes Tokheim's breach of duty in the negative (silence) or in the affirmative (misstatements). As

found by the trial court and the Court of Appeals of Iowa, and not contested on this appeal, John Tokheim and the Farmers State Bank occupied a fiduciary relationship in regard to the Respondent's business affairs. Because of the superior relationship that existed between the parties, actionable fraud may be established either by affirmative misstatement or by the absence of a statement.

First National Bank in Lenox v. Brown, 181 N.W. 2d 178, 182 (Iowa 1970). Whether one views the record as showing that John Tokheim told Respondent, "you owe the bank about \$17,000.00 . . .," or as a failure to disclose where Tokheim did not tell Respondent, "you owe John Tokheim \$6,865.00 and you owe the bank another \$8,286.00. . ." the result is still the same, namely, a breach of the confidential relationship and corresponding duty owed by Petitioners to Respondent.

In summary, the record supports the finding by the advisory jury, the trial judge, the unanimous Court of Appeals of Iowa and the Supreme Court of Iowa that Petitioners perpetrated a fraud upon Respondent to induce him to convey the land to Petitioners, and all issues were before the courts below in making their determination. The Court of Appeals of Iowa was within its equity powers in the de novo review to expand upon the trial court's finding of fraud: the facts and law applicable to the case were not changed by the opinion of the Court of Appeals of Iowa. No federal question of any substance is presented for review.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify on the 2nd day of March, 1979, I did serve the within Brief in Opposition to Petition for Writ of Certiorari to the Court of Appeal of Iowa on all other parties to this appeal or review by mailing 3 copies thereof to the following respective counsel for said parties:

Ray Franck	Robert C. Hunter
203 N. Main Street	Drake University Law
Denison, Ia. 51442	School
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in full compliance with the provisions of Rule 33, Supreme Court Rules.



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A P P E N D I X

AMENDMENT TO PETITION

IN THE DISTRICT COURT OF IOWA
IN AND FOR CRAWFORD COUNTY

RONALD BLUME, *

PLAINTIFF *

V. *

JOHN TOKHEIM, MARY * AMENDMENT TO PETITION
C. TOKHEIM and *
FARMERS STATE BANK, *
Charter Oak, Iowa *

DEFENDANTS *

Plaintiff amends his Petition now on file
by adding thereto the following as Division
IV:

"Plaintiff for further cause of action
in equity states:

1. He realleges Paragraphs 1, 2, 3, 4,
5, 6, 7, 8, 9, 11, and 12, of Division I.

2. He realleges Paragraphs 2, 3, 4, 5,
6, of Division II.

3. He realleges Paragraphs 2, 3 and 4
of Division III.

4. All of said representations were
made by the Defendant, John C. Tokheim to
induce Plaintiff to make, execute and
deliver Exhibit "A" attached to the original

Petition and Exhibits "B" and "C", which are attached hereto and made a part hereof, the same being Quit Claim Deeds to the following described real estate, to-wit:

Northeast Quarter of Section Sixteen (16), Township Eighty-four (84) North, Range forty (40) West of the 5th P.M. lying North of Highway running over and across said land more particularly described as Lot One (1) and subdivision of the Northeast Quarter of Section Sixteen (16), Township Eighty-four (84) North, Range forty (40) West of the 5th P.M., Crawford County, Iowa,

containing 142.9 acres more or less dated January 9, 1973 to Mary C. Tokheim and a Quit Claim Deed to the following described real estate, to-wit:

East Half of the Northeast Quarter of Section thirty-three (33) Township Eighty-four (84) North, Range forty-three (43) West of the 5th P.M., Monona County, Iowa

to Mary C. Tokheim, dated January 9, 1973.

5. In reliance of said representation, Plaintiff executed said Instruments and was defrauded in the inception and therefore is entitled to the return of all of the assets allegedly assigned on Exhibits "A", "B", and "C".

6. Plaintiff now tenders full equity in the premises and offers restoration to Defendants what they had before the Instruments labelled "A", "B" and "C" were signed.

7. On Plaintiff's discovery of the misrepresentation, Plaintiff demanded a cancellation of the Instruments and the return of the money paid in exchange for possession.

8. By reason of the confidential relationship between Plaintiff and the Defendant, John Tokheim, as officer and agent for Farmers State Bank, Charter Oak, Iowa, and without independent advise or assistance, Plaintiff executed said Instruments and said transaction was grossly unfair, and said Deeds were obtained from Plaintiff by some manner of fraud, influence and advantage arising therefrom.

9. The consideration for the transactions was wholly insufficient and inequitable.

WHEREFORE, Plaintiff prays that said contracts, namely exhibits "A", "B", and "C" be cancelled; that he be released from apparent obligation thereof; that he have judgment against the Defendants for the fair rental value of said premises since the date of taking with interest from the date of said Instruments and costs and for accounting of all matters above mentioned and any other matters which maybe incident thereto, and for judgment for any additional sum which such accounting may show due him; that he be restored to the full ownership of the said personal property and real estate upon

paying the Defendants any amounts they have paid to him or third persons in payment of said property, which he now tenders and offers to pay; that the Court do full equity to each party and give such relief as may be equitable in the premises."

WUNSCHEL LAW FIRM, P. C.

/s/ Russell S. Wunschel

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ATTORNEYS FOR THE PLAINTIFF.

STATE OF IOWA)
)ss.
CARROLL COUNTY)

I, Ronald Blume, on oath do depose and state that I am the Plaintiff in the above entitled matter; that I have read the foregoing Amendments and that the allegations and statements therein contained are true and correct as I verily believe.

/s/ Ronald Blume

Ronald Blume

Subscribed and sworn to before me by the said Ronald Blume on this 17 day of August, 1974.

/s/ Russell Wunschel

Notary Public In and For
Said County and State.

Original filed. Copy sent to:

Ray Franck
Attorney at Law
203 North Main
Denison, Iowa